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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

MAR 11 1996

In the Matter of)	FCC 96-52
)	
Revision of Part 22 and Part 90)	WT Docket No. <u>96-18</u>
of the Commission's Rules to)	
Facilitate Future Development of)	
Paging Systems)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communications Act --)	
Competitive Bidding)	

To: The Commission

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**REPLY COMMENTS OPPOSING THE PAGING APPLICATION
FILING AND PROCESSING FREEZE
AND
REPLY COMMENTS CONCERNING THE INTERIM LICENSING PROPOSAL**

Mobilfone Service, Inc., by its attorney, hereby submits reply comments in opposition to the Commission's paging application filing and processing freeze and submits reply comments concerning the Commission's proposed interim licensing proposal contained in the Notice of Proposed Rule Making (NPRM) in the captioned docket. In reply thereto, the following is respectfully submitted:

1) Review of the initial comments reveals an overwhelming opposition to the Commission's paging application filing and processing freeze. See, e.g., Emergency Petition for Immediate Withdrawal of Freeze (Coalition for a Competitive Paging Industry), pp. 20-23; Comments of the Personal Communications Industry Association on Interim Licensing Procedures, pp. 20-37; Comments

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of Frontier Corporation on Interim Licensing Proposal, p. 4; Comments of the Paging Coalition on Interim Paging Licensing Procedures, pp. 2-4; Comments (Source One Wireless, Inc.), pp. 3-4; Comments of Nationwide Paging, Inc. and (800) Page-USA, Inc. on Interim Licensing Proposal, pp. 3-4; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Porter Communications, Inc.) pp. 4-5; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Chequamegon Telephone Cooperative, Inc.) pp. 2-5; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Baker's Electronics and Communications, Inc.) pp. 2-5; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Paging Associates, Inc.) pp. 2-5.

2) There is also a great consensus that licenses issued during the interim licensing period should be issued on a primary, not a secondary, basis. Primary licensing is required so that companies, especially small and mid-sized companies, will not incur the additional risk that capital would be forfeited should a regional paging licensee enter the market. See, e.g., Comments of the Personal Communications Industry Association on Interim Licensing Procedures, pp. 39-40; Comments of Metamora Telephone Company, Inc., p. 2; Comments of Nationwide Paging, Inc. and (800) Page-USA, Inc. on Interim Licensing Proposal, pp. 5-6.

3) Various commenters suggested that during the pendency of the rule making that the Commission continue to accept and process applications as the Commission did after the Commission proposed to significantly alter the common carrier paging licensing process in its Report and Order, 95 F.C.C.2d 769, 825 (1983). Applications granted while the Commission determined whether or not to remove the wireline/non-wireline frequency fence were granted on a primary basis. See, e.g., Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Porter Communications, Inc.) pp. 4-5; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Chequamegon Telephone Cooperative, Inc.) pp. 4-5; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Baker's Electronics and Communications, Inc.) pp. 4-5; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Paging Associates, Inc.) pp. 4-5.

4) Opposition to the freeze was nearly universal, and for good reason: The Commission's paging application filing/processing freeze violates the Communications Act.¹ 47 U.S.C. §309(j)(1)

¹ Moreover, for the reasons discussed below, Commission adoption of the wide-area paging application filing and processing rules proposed in the NPRM would also violate the requirements of the Communications Act. It is arbitrary and capricious for the Commission to freeze the acceptance and processing of all paging applications while it considers adoption of rules which violate the Communications Act.

authorizes the Commission to conduct auctions only for "mutually exclusive applications . . . accepted for filing for any initial license or construction permit" The legislative history is very clear that the auction authority

would apply only when there are mutually exclusive applications for an initial license for the use described in subsection 309(j)(2). Competitive bidding would not be permitted to be used for unlicensed uses; in situations where there is only one application for license, or in the case of for [sic] a renewal or modification of license. H.R. Rep. No. 111, 103d Cong. 1st Sess. 253 (1993).

5) Congress has specifically instructed the Commission that it cannot auction spectrum in instances where a station modification is proposed and in instances where there is only one application for an initial license. Congress specifically indicated that modification and non-mutually exclusive applications should continue to be accepted and processed by the Commission. Thus, the Commission's paging application filing/processing freeze violates the Communications Act to the extent that the freeze prevents non-mutually exclusive applications and modification applications from being filed.

6) Accordingly, the Commission must lift the freeze and accept and process paging applications. If mutually exclusive paging applications are filed, action on those applications could be deferred until the Commission develops final auction procedures.

7) The NPRM states that one of the Commission's goals is to "adopt competitive bidding rules for mutually exclusive paging applications" NPRM, para. 1. The Commission has previously determined that mutually exclusive paging applications should be

subject to auctions. Second Report and Order, 75 R.R.2d 1, 17 (Comm'n 1994). All that is left to do is determine which auction procedures are best suited to various situations which arise in the paging industry.

8) Rather than merely determine an appropriate auction process for mutually exclusive paging applications, however, the Commission has determined that it needs to examine whether to institute fundamental alterations to the paging services' licensing schemes. During the nearly fifty years in which paging systems have been authorized, the market place has determined the size of a particular paging system's service area. Yet, despite the Commission's acknowledgement that the paging industry is expanding rapidly, NPRM, para. 6, and despite the Commission's acknowledgement that "current licensing on the lower paging bands is confined largely to the addition of fill-in sites and minor expansion by existing licensees," NPRM, para. 13, the Commission has preliminarily determined that Federal regulation of paging market sizes is required.

9) Congress directed that "the Commission should, in the public interest, continue to use engineering solutions, negotiation, threshold qualifications, service rules, and other means in order to avoid mutual exclusivity." H.R. Rep. No. 111, 103d Cong. 1st Sess. 258 (1993). Rather than follow this clear Congressional mandate, and after nearly fifty years of a free market approach, the Commission has proposed creation of artificial, federally-sized paging markets. This market structure is intended to create

mutually exclusive application situations for the purpose of holding auctions in direct contravention of Congress' stated intent!

10) In 1987 the Court of Appeals for the D.C. Circuit determined that the Commission exceeded its authority when it attempted to preempt state entry regulation of intrastate common carrier mobile services. The Commission describes the Court's action at Memorandum Opinion and Order, 2 FCC Rcd. 6434 (Comm'n 1987).

11) In the instant proceeding, the Commission is attempting to turn what are essentially intrastate paging services into interstate services through adoption of the Rand-McNally MTA market structures. Rand-McNally MTA's generally overlap state lines. The NPRM contains insufficient evidence which demonstrates that the intrastate nature of the paging industry has changed in the past nine years. Indeed, a large number of initial comments in this proceeding demonstrate that the substantially intrastate nature of the paging industry remains; many carriers indicated that their service areas are much smaller than the MTA's proposed by the Commission. See, e.g., Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Porter Communications, Inc.) p. 1; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Chequamegon Telephone Cooperative, Inc.) p. 1; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning

the Interim Licensing Proposal (Baker's Electronics and Communications, Inc.) p. 1; Comments Opposing the Paging Application Filing and Processing Freeze and Comments Concerning the Interim Licensing Proposal (Paging Associates, Inc.) p. 1.

12) The Commission's proposal to turn the paging industry into an exclusively interstate service through the creation of artificial paging markets is neither supported by the facts nor the law. Because the Commission's proposed restructuring of paging market size has basis in neither law nor fact, the Commission should lift the paging application filing/processing freeze and permit the paging industry to return to the Commission acknowledged robust growth.

WHEREFORE, in view of the information presented herein and in the vast majority of comments submitted thus far in this proceeding, the Commission should lift the paging application filing/processing freeze and process non-mutually exclusive applications on a primary basis during the pendency of the rule making.

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March 11, 1996

Respectfully submitted,
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